Deleum Primera Sdn Bhd v Mazrin bin Ramli & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCC-544–11 OF 2020
ONG CHEE KWAN JC
22 MARCH 2021

Civil Procedure — Judge — Recusal — Defendants applied to recuse judge — Whether plaintiff dragged judge into arena of dispute — Whether judge assisted plaintiff in its ex parte applications

These were recusal applications filed by the first to fourth defendants, the eight defendant and the tenth defendant under encls 246, 250 and 252 respectively ('the recusal applications'). On 5 November 2020, the plaintiff commenced this action and applied ex parte for various injunctive reliefs in the nature of an Anton Pillar and Mareva orders against the defendants. Due to the urgency of this matter and because of the Covid-19 pandemic in the country, the ex parte hearing was fixed on the next day by way of the e-review remote platform ('the ex parte applications'). On the next day, the plaintiff duly logged into the e-review platform for the hearing of the plaintiff's ex parte applications ('ex parte e-review hearing'). During the ex parte e-review hearing, the court raised several issues which concerned the court arising from the plaintiff's written submission filed in support of the ex parte applications. As a result of the court's queries, the plaintiff informed the court that the plaintiff would file supplemental affidavits and supplemental submissions to address the court's concerns and the ex parte e-review hearing was adjourned to be heard on 9 November 2020 via the Zoom remote platform. Over that weekend, the plaintiff duly drafted two supplemental affidavits which could not be affirmed as the Commissioner for Oath's office was closed during the weekend. Therefore, the contents of affidavits were merely verified and signed ('the supplemental affidavits'). The supplemental affidavits were filed together with the supplemental written submissions on 8 November 2020 as directed. During the ex parte Zoom hearing, the plaintiff informed that the plaintiff was willing to seek a forthwith delivery up order instead of an Anton Pillar order. After the court received clarifications to the draft forthwith delivery up order, the court then granted the delivery up order with further amendments with a view to protect the defendants' interest and to afford further safeguards to the defendants ('the ex parte orders'). The court also allowed the plaintiff's request to regularise all the cause papers by the 'end of November' ('the undertaking'). Subsequent to the granting of the ex parte orders and the execution of the same, the defendants applied on a certificate of urgency to stay and/or set aside the ex parte orders ('the setting aside/stay applications'). At the hearing of the setting aside/stay applications on 4 December a2020 ('the 4 December 2020

hearing'), the defendants raised technical objections but was dismissed. When the court resumed the hearing for the setting aside/stay applications, the defendants proceeded with their applications to recuse the judge.

Held, dismissing encls 246, 250 and 252 with costs:

(1) There was absolutely nothing wrong for the court to grant the ex parte order based on affidavits that were un-affirmed based on the counsel giving an undertaking that the same would be regularised in due course. This was not uncommon in cases of urgency when it may not be practicable to have the affidavits affirmed prior to the hearing. Based on the court's records, the statements made by the plaintiff at 4 December 2020 hearing were an accurate reflection of the actual facts. This could not constitute 'dragging the learned JC into the arena of the dispute'. It certainly did not warrant a suggestion that the court was 'assisting' the plaintiff when the court had agreed to his statement that the undertaking was in fact given at the ex parte Zoom hearing. The defendants' contentions lacked substance and had no legal basis at all (see paras 60, 64 & 68).

(2) What the court did at the ex parte e-review hearing was to inform the plaintiff as to what was troubling the court in respect of the ex parte applications and to ask the plaintiff to address the same. The court could not see how it could reasonably be argued that there was a real danger of bias arising from the court's action in seeking the clarifications from counsel. Merely because the defendants may not be happy with the court's decision to proceed to hear the ex parte applications on an ex parte basis after expressing a tentative view of the plaintiff's application did not warrant a recusal application. The defendants absolutely failed to provide any cogent argument how the decision to proceed to hear the plaintiff ex parte could give rise to a 'real danger of bias' on the court's part. There was plainly no substantive basis or any cogent evidence to support the defendants' claim of a real danger of bias to merit the judge's recusal from hearing this case. The defendants were not entitled to the recusal based on the 'flimsiest pretext of bias' (see paras 77, 84–85 & 87).

[Bahasa Malaysia summary

Ini adalah permohonan penarikan diri yang difailkan oleh defendan pertama hingga keempat, defendan kelapan dan defendan kesepuluh masing-masing di bawah lampiran 246, 250 dan 252 ('permohonan penarikan diri'). Pada 5 November 2020, plaintif memulakan tindakan ini dan memohon ex parte untuk pelbagai relif injunksi seperti perintah Anton Pillar dan Mareva terhadap defendan. Oleh kerana kepentingan perkara ini dan kerana wabak Covid-19 di negara ini, pendengaran ex parte ditetapkan pada hari berikutnya melalui platform jarak jauh e-review ('permohonan ex parte'). Pada keesokan harinya, plaintif log masuk ke platform e-review untuk pendengaran

permohonan ex parte plaintif ('pendengaran ex parte e-review'). Semasa pendengaran ex parte e-review, mahkamah mengemukakan beberapa isu yang memberi kekhuatiran kepada mahkamah yang timbul daripada hujahan bertulis plaintif yang difailkan untuk menyokong permohonan ex parte. Hasil daripada pertanyaan mahkamah, plaintif memberitahu mahkamah bahawa plaintif akan memfailkan afidavit tambahan dan hujahan tambahan untuk menangani kekhuatiran mahkamah dan pendengaran ex parte e-review ditangguhkan untuk didengar pada 9 November 2020 melalui platform jarak jauh Zoom. Pada hujung minggu itu, plaintif telah mendraf dua afidavit tambahan yang tidak dapat diikrarkan kerana pejabat Pesuruhjaya Sumpah ditutup pada hujung minggu. Oleh itu, kandungan afidavit hanya disahkan dan ditandatangani ('afidavit tambahan'). Afidavit tambahan difailkan bersama dengan hujahan bertulis tambahan pada 8 November 2020 seperti yang diarahkan. Semasa pendengaran ex parte Zoom, plaintif memaklumkan bahawa plaintif bersedia memohon perintah penyerahan dan bukannya perintah Anton Pillar. Setelah mahkamah menerima penjelasan mengenai draf perintah penyerahan, mahkamah kemudian membenarkan perintah penyerahan dengan pindaan lebih lanjut dengan tujuan untuk melindungi kepentingan defendan dan memberikan perlindungan lebih lanjut kepada defendan ('perintah ex parte'). Mahkamah juga membenarkan permintaan plaintif untuk menyelesaikan semua kertas kausa pada 'akhir November' ('akujanji'). Setelah pemberian perintah ex parte dan pelaksanaan perintah yang sama, defendan memohon perakuan segera untuk menggantung dan/atau mengetepikan perintah ex parte ('permohonan mengetepikan/menggantung). Pada pendengaran permohonan mengetepikan/menggantung pada 4 Disember2020 ('pendengaran 4 Disember 2020'), defendan mengemukakan bantahan teknikal tetapi ditolak. Ketika mahkamah menyambung semula pendengaran untuk permohonan mengetepikan/menggantung, defendan meneruskan permohonan mereka untuk menarik diri hakim.

Diputuskan, menolak lampiran 246, 250 dan 252 dengan kos:

(1) Tidak ada yang salah bagi mahkamah untuk membenarkan perintah ex parte berdasarkan afidavit yang tidak diikrarkan berdasarkan peguam yang memberi akujanji bahawa perkara yang sama akan diatur pada waktunya. Perkara ini tidak jarang berlaku dalam keadaan mendesak apabila tidak mungkin praktikal untuk mengikrarkan afidavit sebelum pendengaran. Berdasarkan rekod mahkamah, pernyataan yang dibuat oleh plaintif pada pendengaran 4 Disember 2020 adalah gambaran yang tepat mengenai fakta sebenar. Ini tidak boleh menjadi 'mengheret JC yang bijaksana ke arena perselisihan'. Ia tidak mewajarkan cadangan bahawa mahkamah 'menolong' plaintif ketika mahkamah telah menyetujui pernyataannya bahawa akujanji tersebut sebenarnya diberikan pada pendengaran Zoom ex parte. Pendapat defendan tidak

mempunyai makna dan sama sekali tidak mempunyai asas undang-undang (lihat perenggan 60, 64 & 68).

(2) Apa yang dilakukan mahkamah pada pendengaran e-review ex parte adalah untuk memberitahu plaintif mengenai apa yang mengganggu mahkamah berkenaan dengan permohonan ex parte dan meminta plaintif untuk menangani hal yang sama. Mahkamah tidak dapat melihat bagaimana hal itu dapat dipertikai secara wajar bahawa terdapat bahaya berat yang nyata sebelah yang timbul daripada tindakan mahkamah dalam meminta penjelasan daripada peguam. Hanya kerana defendan mungkin tidak senang dengan keputusan mahkamah untuk terus mendengar permohonan ex parte secara ex parte setelah menyatakan pandangan tentatif terhadap permohonan plaintif tidak mewajarkan permohonan penarikan diri. Defendan sama sekali gagal memberikan hujahan yang meyakinkan bagaimana keputusan untuk terus mendengar ex parte plaintif dapat menimbulkan 'bahaya berat sebelah yang nyata' di pihak mahkamah. Tidak ada dasar yang nyata atau bukti yang meyakinkan untuk menyokong tuntutan defendan mengenai bahaya berat sebelah yang nyata untuk membenarkan penarikan diri hakim untuk mendengar kes ini. Defendan tidak berhak mendapat penarikan diri berdasarkan 'flimsiest pretext of bias' (lihat perenggan 77, 84–85 & 87).]

Cases referred to

Ang Sue Khoon v Majlis Bandaraya Pulau Pinang & Anor [2016] MLJU 1342 (folld)

Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 1) [2012] 10 MLJ 526, HC (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasamasama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Mohamed Ezam bin Mohd Nor & Ors vKetua Polis Negara [2002] 1 MLJ 321, FC (refd)

Pembinaan BLT Sdn Bhd v Debessa Development Sdn Bhd [2015] 9 MLJ 335, HC (refd)

R v Gough [1993] AC 646, HL (refd)

Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd [2014] 10 MLJ 413, HC (refd)

Richmond River Broadcasters Pty Ltd and Another v Australian Broadcasting Tribunal and Others (1992) 106 ALR 671, FC (refd)

SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors [2020] MLJU 400; [2020] 1 LNS 316, HC (refd)

Wong Kie Chie & Ors v Katheryn Ma Wai Fong & Anor and other appeals [2017] 3 MLJ 350, CA (folld)

Legislation referred to

Rules of Court 2012 O 1A, O 2 r 1(2), O 41 r 4, O 92 r 1(4)

Lim Chee Wee (Nathalie Ker, Kelvin Seah Khye Jie, Chua Yi Xin and Michelle Yeoh with him) (Lim Chee Wee Partnership) for the plaintif.
Haniff Khatri (Nurul Huda Razali with him) (Haniff Khatri) for the first, second, third and fourth defendants.
Mohd Zaharudeen Harun (Adi Hazlan Mawardi with him) (Nik Saghir & Ismail) for the fifth and sixth defendants.
Azmeer bin Md Saad (Lainah Yaacob & Zulkepli) for the seventh defendant.
Nur Izzaida Zamani (Irna Shahana Samsudin with her) (CK Ling Izzaida & Irna) for the eighth defendant.
Loh Choy Luey (Chua Partnership) for the ninth defendant.
Idi Amin (Suzi Maszalina & Assoc) for the tenth defendant.

Ong Chee Kwan JC:

INTRODUCTION

[1] Every judge of the superior courts in Malaysia takes an oath to discharge his judicial duties honestly and impartially to the best of his ability. Judges are duty bound to make decisions according to law and uninfluenced by personal bias, conflict of interest, without fear or favour, affection or ill-will or prejudice. In fact, a judge's duty to act honestly and impartially is the defining feature of the judge's role in the administration of justice.

[2] Thus, when an application is made to recuse a judge, it touches upon a very fundamental aspect of the administration of justice and public confidence in the system of justice. Thus, any allegation of bias or reasonable apprehension of bias against a judge is a serious allegation and must be based on substantial grounds. If the application is made in a cavalier manner or based on bad faith or frivolous grounds, it may expose the applicant to possible contempt proceedings.

[3] This judgment deals with recusal applications filed by the first to fourth defendants, the eighth defendant and the tenth defendant under encls 246, 250 and 252 respectively ('the recusal applications').

BACKGROUND FACTS

[4] On Thursday, 5 November 2020, the plaintiff commenced this action and applied ex parte for various injunctive reliefs in the nature of an *Anton Pillar* and *Mareva* orders against the defendants. Due to the urgency of this matter and because of the Covid-19 pandemic in the country, the ex parte

hearing was fixed on the next day by way of the e-review remote platform ('the ex parte applications').

[5] On the next day, Friday 6 November 2020, learned counsel for the plaintiff duly logged into the e-review platform for the hearing of the plaintiff's ex parte applications (ex parte e-review hearing').

[6] During the ex parte e-review hearing, the court raised several issues which concerned the court arising from the plaintiff's written submission filed in support of the ex parte applications. More specifically, I had wanted learned counsel for the plaintiff to provide further research and submissions to assist the court to determine whether an *Anton Pillar* ought to be granted in the light of the Covid-19 pandemic and whether the plaintiff can be said to be imputed with the fraud raised against the defendants in the ex parte applications.

[7] Notwithstanding that the affidavits did disclose some fraudulent activities, I had expressed some concern on the proportionality of granting a search and seizure order during the Covid-19 pandemic whilst seeking to balance the objective of preserving the evidence as sought by the plaintiff. On the issue of imputation of fraud, I had drawn the attention of counsel for the plaintiff to a few English cases for his response.

[8] As a result of my queries, learned counsel for the plaintiff needed some time and the ex party e-review hearing was adjourned to be heard the following Monday, 9 November 2020 via the Zoom remote platform as oral submissions would be required from counsel to better address the issues raised by the court. Following from the aforesaid, learned counsel for the plaintiff informed the court that the plaintiff would file supplemental affidavits and supplemental submissions to address the court's concerns.

[9] I allowed learned counsel for the plaintiff's request and asked that he email the documents by the noon on Sunday, 8 November 2020 so that I could read the same prior to the Zoom hearing on Monday, 9 November 2020.

[10] Over that weekend, learned counsel for the plaintiff duly drafted two supplemental affidavits, namely, that of one Jayanthi a/p Gunaratnam ('Jayanthi') and one Alexander Michael Kuan Yew Tan ('Alex Tan'). However, Jayanthi and Alex Tan could not affirm their respective affidavits as the commissioner for oath's office was closed during the weekend. Therefore, they merely verified the contents of their affidavits and signed the same ('the supplemental affidavits').

[11] The signed but yet un-affirmed copy of the supplemental affidavits ('encls 18 and 19') were filed together with the supplemental written

submissions (encl 20) on Sunday, 8 November 2020 as directed. The plaintiff's solicitors also emailed all the documents to the court on the same day, as directed.

[12] On Monday, 9 November 2020 learned counsel for the plaintiff appeared before the court again for the ex parte Zoom hearing ('ex parte Zoom hearing').

[13] Learned counsel informed the court that they had filed encls 18 to 20 on Sunday to address the court's queries raised in the ex parte e-review hearing. The court confirmed receipt of the supplemental affidavits under encls 18 and 19 and the supplemental submissions under encl 20.

[14] During the ex parte zoom hearing, learned counsel for the plaintiff informed the court that the plaintiff, after reflecting on the concerns raised by the court, was willing to seek a forthwith delivery up order instead of an Anton Pillar order. Pursuant thereto, learned counsel for the plaintiff informed the court that they had prepared a draft forthwith delivery up order for the court's perusal.

[15] Given the concession from learned counsel for the plaintiff to their ex parte applications, this court then proceeded to examine the draft forthwith delivery up order and worked through with learned counsel for the plaintiff some practical questions relating to the draft terms and the intended execution of the same. This was done to ensure that proper safeguards are in place for the defendants when the orders are being executed.

[16] After the court received clarifications to the draft forthwith delivery up order, this court then granted the forthwith delivery up order with further amendments with a view to protect the defendants' interest and to afford further safeguards to the defendants ('the ex parte orders')

UNDERTAKING TO REGULARISE THE CAUSE PAPERS

[17] Before concluding the session, learned counsel for the plaintiff then asked the court if the plaintiff could regularise all the cause papers, namely, 'to file the proper Bahasa, English, affirmed and attested copy within two weeks, before 20 November 2020' ('the undertaking').

[18] Being a purely administrative and procedural process, this court readily allowed such request and stated that the plaintiff could regularise its cause papers by the 'end of November' as the plaintiff should be focusing on the execution of the ex parte orders.

[19] The events recounted above is evident from the transcript of the ex parte Zoom hearing, as follows:

> PC1: It comes withing 2 weeks. Yes. Then My lord, the other housekeeping matters is the Bahasa version of the ... of some of the cause papers, namely the Statement of Claim, and then the Bahasa version of the 2 recently filed affidavits and the earlier supporting affidavit, can we have time, My Lord, to file the proper Bahasa Inggeris, affirmed and attested copy withing 2 weeks? Before the 20th November?
>
> YA: You can have more time than that because you should be focusing on your execution and Mareva ...
>
> PC1: Very well. Then can we have it until end of November, My Lord?
>
> YA: Yes. You do it end of November.

[20] There is no dispute that the plaintiff had fully complied with its undertaking to regularise all the cause papers before the stipulated deadline, ie by the end of November 2020. In any case, this is apparent from the following events:

(a) on 14 November 2020, the plaintiff filed the affirmed versions of encls 18 and 19, as encls 54 and 55. The same were served on the defendants' solicitors by way of email on 16 November 2020 and by hand on 17 November 2020;

(b) on 16 November 2020, the plaintiff filed encl 19 in the national language, as encl 72. The same was served on the defendants' solicitors by way of email on 16 November 2020 and by hand on 17 November 2020;

(c) on 17 November 2020, the plaintiff filed encl 18 in the national language, as encl 79. The same was served on the defendants' solicitors by way of email and by hand on 17 November 2020; and

(d) on 24 November 2020, the plaintiff filed the statement of claim in the national language, as encl 127. The same was served on the defendants' solicitors by hand on 27 November 2020.

[21] The aforesaid is in accordance with the undertaking and the court's directions.

THE DEFENDANTS' APPLICATION TO SET ASIDE THE EX PARTE ORDERS

[22] Unsurprisingly, subsequent to the granting of the ex parte orders and the execution of the same, the defendants applied on a certificate of urgency to stay and/or set aside the ex parte orders ('the setting aside/stay applications').

[23] At the hearing of the setting aside/stay applications on 4 December

2020 ('the 4 December 2020 hearing'), the defendants' counsel collectively raised three technical objections which briefly, are as follow: A

(a) the plaintiff did not incorporate the inter parte hearing date in the ex parte orders; and

(b) the plaintiff did not give an undertaking to affirm encls 18 and 19 prior to the making of the ex parte orders; and B

(c) the plaintiff did not file the affidavits in the national language.

[24] After hearing submissions from counsel on the said technical objections raised, I dismissed the same without any hesitation. C

[25] The first technical objection is without merit as the court did direct for a return date and this date was clearly stated in the plaintiff's learned counsel's cover letter issued when the ex parte orders was served by the plaintiff's learned counsel. The defendants were therefore notified of the same. D

[26] The second and third technical objections relate to the un-affirmed affidavits in support filed and used at the ex parte Zoom hearing. There is also no merit to the objections as learned counsel for the plaintiff had in fact provided the court with the undertaking to regularise its cause papers within the stipulated time. There was no question of the court not being aware that the supplemental affidavits were not affirmed at the time of the ex parte Zoom hearing as the court was duly appraised of this fact. E F

[27] After the decision was delivered dismissing the technical objections, learned counsel for the first to fourth defendants requested for the hearing of the setting aside/stay applications to be stood down before resuming. G

THE RECUSAL APPLICATIONS

[28] When the court resumed the hearing for the setting aside/stay applications, learned counsel for the first to fourth defendants informed the court that he had been instructed to move an oral application to recuse me from hearing the applications on the ground that I have been unnecessarily 'brought into the arena of the disputes' and that it would be embarrassing for the court if I continue to hear the matters. H

[29] Learned counsel for the eighth and tenth defendants' also followed in the footsteps of learned counsel for the first to fourth defendants and informed the court that they too had their client's instructions to apply to recuse me from hearing the applications. I

[30] When I inquired to understand what counsel meant by the claim that I have been 'brought into the arena of the disputes', learned counsel for the first to the fourth defendant stated that I had been dragged by learned counsel for the plaintiff into resolving the issue as to whether the undertaking was in fact given with regard to the un-affirmed affidavits. He mentioned that because the exchanges between counsel for the plaintiff and me at the ex parte e-review hearing and the ex parte Zoom hearing were in the nature of ex parte proceedings, the defendants were concerned of the perception that I could be 'assisting' the plaintiff on the issue involving the undertaking. By this, I had understood it to mean that the defendants had entertained some doubts as to whether learned counsel for the plaintiff had in fact provided the court with the undertaking even though I had confirmed that the undertaking was given when learned counsel for the plaintiff had referred this court to it at the 4 December 2020 hearing.

[31] Thinking that this issue could be easily resolved since the ex parte Zoom hearing was conducted virtually and was recorded, I suggested to learned counsel for the defendants that they may obtain the video recording of the ex parte Zoom hearing and thereafter to consider again whether they still wish to pursue the recusal applications, in which event, formal applications can then be filed.

[32] My suggestion was taken up by counsel for the defendants.

[33] However, when the matter was heard again after they had the opportunity to review the video recording and after transcribing the proceedings, I was informed that the defendants would still proceed with their applications to recuse me. This led to the filing of encls 246, 250 and 252 which are the formal applications for recusal filed by first to fourth defendants, eighth defendant and tenth defendant respectively.

LAW ON RECUSAL

[34] At the start of the applications, learned counsel for the first to fourth defendants expressly informed this court that he is in agreement with learned counsel for the plaintiff's exposition of the legal principles on recusal as submitted in the plaintiff's written submission. I will briefly set out these legal principles.

[35] It is settled that an applicant in a recusal application bears the heavy burden to satisfy the 'real danger of bias' test enunciated by our Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasamasama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (FC) and in *Mohamed Ezam bin Mohd Nor & Ors vKetua Polis Negara* [2002] 1 MLJ 321 (FC).

[36] The 'real danger of bias' test was derived from the English House of Lord's decision in *R v Gough* [1993] AC 646 (UKHL) where Lord Goff explained the test as follows:

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.

[37] Lord Goff further concluded that it is unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man.

[38] Our recent Court of Appeal's decision in *Wong Kie Chie & Ors v Katheryn Ma Wai Fong & Anor and other appeals* [2017] 3 MLJ 350 (CA) is instructive. In this appeal, Vernon Ong JCA (as His Lordship then was) examined the English and Malaysian jurisprudence on judicial recusal.

[39] His Lordship reiterated that the decision whether to recuse a judge from the case will depend fundamentally on the particular facts and circumstances of each case and the court should be vigilant not to allow parties to do judge-shopping by recusal of judges.

[40] His Lordship concluded, at para 41 of the judgment, by expressing that:

> [41] Accordingly, judges should balance properly their competing duties as judges when recusal applications fall to be decided by them. Settled principles dictate that judges have a duty to sit and adjudicate on cases allotted to them, displaced only when there are objectively justifiable grounds for recusal, that litigants cannot judge-shop and judges cannot case-shop and that the administration of justice is served as much by a fearless and confident Judiciary as by a fair Judiciary (Inappropriate Recusals).

[41] In essence, Vernon Ong JCA (as His Lordship then was) emphasised the need to be vigilant in deciding a recusal application. This is because the 'real danger of bias' test imposes a higher threshold for the applicant to succeed as compared to the other tests adopted in other jurisdictions, such as 'the real suspicion of bias test' or 'the real likelihood of bias test'.

[42] In another Court of Appeal decision in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213 (CA), it was said that the trial judge did not find any substance in the defendants' recusal application, but His Lordship still acceded to the defendants' request. The Court of Appeal

unanimously allowed the appeal and directed the trial judge to hear the trial of the matter.

[43] In reaching that decision, Gopal Sri Ram JCA (as His Lordship then was) expressed, at p 220 of the judgment, that:

> In my judgment, it is a most serious matter to allege bias against a judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

[44] NH Chan JCA (as His Lordship then was) in *Hock Hua Bank* also pointed out that there exists a presumption that judges could only be found to be biased in some limited circumstance. This is what His Lordship had to say, at p 223 of the judgment:

> Other than an interest which is pecuniary or proprietary in subject matter of the proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity.

[45] The decision of *Hock Hua Bank* is also significant as it stands for the proposition that it would be inappropriate for a judge, having considered that the grounds for recusal have not been satisfied, to proceed to recuse himself not on grounds argued before him. In other words, this court is only required to consider the grounds raised in the applicants' supporting affidavits and nothing else.

[46] In the subsequent High Court's decision in *Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 1)* [2012] 10 MLJ 526 (HC), Hamid Sultan J (as His Lordship then was) affirmed that the 'real danger of bias' test imposes a high threshold for the applicant to satisfy.

[47] In dismissing the recusal application, His Lordship held that, in order to justify disqualification or recusal, the judge's bias usually should be personal or based on some extrajudicial reason. It would be a gross dereliction of duty for a judge to disqualify himself where there was no real danger of bias in hearing the case and 'an application for recusal with no appropriate grounds ought to be treated as an attempt to interfere with the administration of justice'.

[48] The justification for such a high threshold was eloquently expressed by the late VT Singham J in the High Court's case of *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd* [2014] 10 MLJ 413 (HC) as follows:

> [24] ... A judge swears on oath that he or she will be impartial, and there is a strong presumption that judges honour the oath and do dispense justice without bias (*R v RDS* [1997] 3 SCR 484 at para 117, *R v Smith & Whiteway Fisheries Ltd (NSCA)* (1994) 133 NSR (2d) 50 (CA)). An allegation of bias or reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the judge and the integrity of the entire institution of justice. The grounds of apprehension of bias must be substantial, but however, each case must be evaluated in its own particular circumstances and in light of the whole proceedings. The party alleging bias has the onus of proving it (Marchand (*Litigation guardian of) v Public General Hospital Society of Chatham* (2001) 51 OR 97 (CA) at para 131, (*leave to appeal SCC refused,* (2001) SCCA No 66)).
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> ...
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> [27] ... If the application for recusal is allowed too freely, it would encourage tactical applications by litigants seeking another judge to hear their case and it ought not to be entertained. A judge's decision which did not favour a litigant cannot be used as an instrument to recuse the judge or to remove the case to another court as the opposing party's right is to file an appeal to the Court of Appeal to have the decision corrected if the losing party is not satisfied with the decision. Under the circumstances, a party who is not satisfied with the decision should not as a matter of right apply to recuse the judge in hearing other pending or related matters by raising allegation of bias or 'reasonable apprehension of bias' which is a serious allegation as it will have far reaching effect on the decision of judges and calls into question the 'personal integrity' of the judge and the integrity of entire administration of justice, (*Marchand (Litigation guardian of) v Public General Hospital Society of Chatham* (2001) 51 OR 97 (CA) at para 131, (*leave to appeal SCC refused,* (2001) SCCA No 66), cause delay in the disposal of cases filed in court as the file has to be transferred to another judge who will have to reschedule the cases fixed in his or her court and it may cause a revolution.

[49] The late VT Singham J in *Residence Hotel* also referred to the two Canadian decisions which explained the concept of 'biasness', at p 433 of the judgment, as follows:

> Bias is commonly described as leaning, inclination, bent or predisposition towards one side or another or a particular result. It represents a predisposition to decide an issue or course in a certain way in its application to legal proceeding which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case. Bias generally refers to the mental attitude or disposition of the judge towards a party-litigant, rather than any views that he or she may entertain regarding the actual subject matter of the dispute (*R v Bertham* [1989] OJ No 2123 (QL), *R v S (RD)* [1997] 3 SCR 484 at para 106).

[50] It is also apposite to refer to the decision of Mary Lim J (as Her Ladyship then was) in the High Court case of *Pembinaan BLT Sdn Bhd v Debessa Development Sdn Bhd* [2015] 9 MLJ 335 (HC) where Her Ladyship commented that:

> [38] It is therefore quite clear that under any test, the courts and the judge, must not lightly or easily recuse oneself. Judges are presumed to conduct their duty in accordance with their oath of office. In fact, the plaintiff's same arguments can be canvassed against recusal. As explained in *R v Winsor* [2014] CanLII 16198, the 'concept of judicial bias 'refers to a judge's predisposition to decide an issue material to the proceedings such that his or her mind is closed or at least strongly resistant to persuasion to the contrary view based on the evidence adduced and submissions made in the specific case' ... That being the case, cogent evidence must be clearly provided for a rational, realistic and practical examination, evaluation or assessment of whether the test of real danger of judicial bias indeed has been satisfied.

[51] From the above, it is abundantly clear that a recusal application must not be allowed too readily. This is because such application could be tantamount to a serious allegation as to the personal integrity of the judges and the integrity of the entire institution of justice. An allegation that the judge had improperly assisted a particular party to the proceedings before him or her or that the judge is acting in concert with counsel to reflect a fact that did not actually exist is an extremely serious charge that has the effect of undermining the administration of justice and the judicial institution. It behoves the applicant when making such allegations to show substantial basis or cogent evidence in his recusal application.

[52] The seriousness of such an application cannot be overstated as Hamid Sultan J (as His Lordship then was) in *Comsa Farms* went on to state that if a recusal application is made in a cavalier manner or bad faith, it may attract the jurisprudence relating to contempt.

ANALYSIS AND DELIBERATION OF ARGUMENTS

[53] As alluded above, the defendants' primary complaint is that learned counsel for the plaintiff has dragged this court into the arena of dispute. In their supporting affidavits, the defendants alleged that the plaintiff had in several instances cited the name of this court and/or had referred to me when learned counsel for the plaintiff was rebutting the defendants' technical objections raised at the 4 December 2020 hearing. This pertained to the issue relating to the un-affirmed affidavits under encls 18 and 19 relied upon at the ex parte Zoom hearing.

[54] The defendants are aware that they are the ones who bear the burden to satisfy the 'real danger of bias' test and that this court ought not to consider other grounds which were not raised in the recusal applications when deciding on the same.

[55] The instance provided by the defendants is the following statement made by learned counsel for the plaintiff at the 4 December 2020 hearing:

... have provided such an undertaking. *If My Lord remember, the e- Review was on Friday, and then My Lord conclude for hearing on Monday morning. And over the weekend, unaffirmed or unattested Affidavits of Jayanthi and Alex which subsequently I then filed the proper affirmed and attested Affidavits'*. (Emphasis added.)

[56] The defendants then went on to allege that:

(a) the plaintiff did not bring to the court's attention that encls 18 and 19 were un-affirmed affidavits;

(b) the plaintiff did not give any undertaking at the ex parte Zoom hearing to affirm encls 18 and 19 prior to the court making its orders; and

(c) the plaintiff however submitted at the 4 December 2020 hearing that there was indeed an undertaking given at the ex parte Zoom hearing which the court confirmed and based on the aforesaid, the contention is that the plaintiff has dragged this court into the arena of dispute.

[57] With respect, I find some difficulty appreciating how the aforesaid could give rise to 'a real danger of bias' on my part. It is also disappointing that the defendants had thought it fit to maintain their complaint on the undertaking even after having watched the recordings of the ex parte Zoom Hearing and having available the transcripts of the proceedings where the undertaking was expressly recorded.

[58] The exchanges between learned counsel for the plaintiff and the court on both occasions, namely at the ex parte Zoom hearing and at the 4 December 2020 hearing are matters which can be determined from the court's records. Indeed based on the transcripts of these proceedings, it can be easily established that:

(a) learned counsel for the plaintiff did provide the undertaking to regularise its cause papers before 20 November 2020. This is illustrated in the later part of the transcripts of the ex parte Zoom hearing as follows:

> PC1: It comes withing 2 weeks. Yes. Then My lord, the other housekeeping matters is the Bahasa version of the ... of some of the cause papers, namely the Statement of Claim, and then the Bahasa version of the 2 recently filed affidavits and the earlier supporting affidavit, can we have time, My Lord, to file the proper Bahasa Inggeris, affirmed and attested copy withing 2 weeks? Before the 20th November?
>
> YA: You can have more time than that because you should be focusing on your execution and Mareva ...
>
> PC1: Very well. Then can we have it until end of November, My Lord?
>
> YA: Yes. You do it end of November.

From the transcripts above, it can be observed that learned counsel for the plaintiff's submissions contained two verbal applications for leave coupled with counsel's undertakings, namely, for leave to use all the cause papers in the English language with an undertaking to file the cause papers in the national language within two weeks (O 92 r 1(4) of the Rules of Court 2012 and for leave to use un-affirmed affidavits with an undertaking to file the affirmed affidavits within two weeks (O 41 r 4 of the Rules of Court 2012); and

(b) in response, the court had allowed the same and said that the plaintiff could regularise its cause papers by the 'end of November' as the plaintiff should be focusing on the execution of the ex parte orders.

[59] For the purposes of the ex parte applications, it would have been clear that the court had effectively granted leave for the use of the un-affirmed affidavits (encls 18 and 19) in view of the learned counsel for the plaintiff's undertaking to regularise the cause papers by the end of November 2020. This must suggest that the court was aware that both encls 18 and 19 were un-affirmed at the time.

[60] There is absolutely nothing wrong for the court to grant the ex parte order based on affidavits that are un-affirmed based on the counsel giving an undertaking that the same will be regularised in due course. This is not uncommon in cases of urgency when it may not be practicable to have the affidavits affirmed prior to the hearing. In the instant case, encls 18 and 19 were filed on 8 November 2020 which was a Sunday. It goes without saying that they are un-affirmed affidavits as the Commissioner for Oaths' office does not operate on weekends.

[61] Indeed, in the recent High Court's decision in *SS Precast Sdn Bhd v Serba Dinamik Group Bhd & Ors* [2020] MLJU 400; [2020] 1 LNS 316 (HC) Wong Kian Kheong J held that the court has a discretionary power under O 41 r 9(2) read together with O 1A and O 2 r 1(2) of the Rules of Court to allow a party to use an un-affirmed affidavit provided that there is an undertaking given by counsel which was the case here.

[62] In reaching to the decision, Wong Kian Kheong J further added at para 23 of the judgment as follows:

> [23] In view of O 1A and O 2 r 1(2) RC, all the rules in RC (including O 41 r 9(1) and (2) RC) should be administered by the court with regard to the 'overriding interest of justice and not only to the technical noncompliance' with RC. Cases decided before the enforcement of O 1A and O 2 r 1(2) RC should be read with caution.

[63] Further, the affirmed versions of encls 18 and 19 were served on the defendants' solicitors before 20 November 2020. This is not disputed by the defendants.

[64] Thus, based on the court's records, the statements made by the learned counsel for the plaintiff at 4 December 2020 hearing were an accurate reflection of the actual facts. This cannot constitute 'dragging the learned JC into the arena of the dispute'. It certainly does not warrant a suggestion that this court was 'assisting' learned counsel for the plaintiff when the court had agreed to his statement that the undertaking was in fact given at the ex parte Zoom hearing.

[65] In fact, even if the statements made by the learned counsel for the plaintiff had turned out to be untrue and are inconsistent with the court's records, there is nothing to stop the defendants, if they deem it fit, to take up the issue as a matter of law to impugn the ex parte orders made. To my mind, it certainly does not justified an accusation that the court has been 'brought into the arena of dispute' and had acted in a manner to give rise to a real danger of bias on the part of this court.

[66] I agree with the submission of learned counsel for the plaintiff that if one were to follow the defendants' logic, this would mean that a litigant can never refer to a judge's earlier direction(s) at any point of the proceedings as this would amount to dragging the judge into the arena of the dispute. Certainly, this cannot be the case. This is so common an occurrence in our courts that one finds it hard to comprehend the action of the learned counsel for the defendants to rely on this ground to file their recusal applications. Sadly, the frivolity of the ground is aggravated by the seniority of counsel representing the defendants in this case.

[67] Not surprisingly, none of the counsel for the defendants was able to refer me to any case law in support of their position on this ground. At the end, all that they could rely on was their bare submission articulated in the following manner:

> The First to Fourth defendants submit from what has been transpired during the earlier part of the hearing on 04 December 2020, it cannot be disputed that from the response of the plaintiff towards the First to Fourth defendants' preliminary issue, in which there have been references made to Court and/or Yang Arif Tuan Ong Chee Kwan on the undertaking to file the Affidavits, the plaintiff has brought Yang Arif Tuan Ong Chee Kwan into the arena of dispute, and that would be embarrassing to this Honourable Court to go further to hear the merit of the case. Based on this ground, the learned judge Yang Arif Tuan Ong Chee Kwan should be recused from hearing the case.
>
> ... that the plaintiff has brought the court into the arena of dispute to cover up the

A weakness of the plaintiff's case when the plaintiff in some circumstances had made reference to the court and or Yang Arif Tuan Ong Chee Kwan in replying to the preliminary issues raised by the First to Fourth defendants with regards to the unsworn Affidavits of encls 18 and 19 in support of the plaintiff's Ex Parte applications in encls 2 and 3.

B

[68] As can be seen, the defendants' contentions lack substance and have no legal basis at all. I have no hesitation in dismissing the same. I cannot see how it can be said that that there is a real danger of bias on my part in continuing to hear applications filed in this action based on the allegation made by the C defendants arising from the statements made by learned counsel for the plaintiff and the exchanges between him and the court at the 4 December 2020 hearing.

D JUDGE ASSISTED THE PLAINTIFF WHEN REFERRING CASE LAW AT EX PARTE HEARING

[69] The second ground relied upon to justify their recusal applications is the fact that this court had, during the ex parte e-review hearing, referred learned counsel for the plaintiff to a few cases not cited by the plaintiff in its E written submissions. The court had referred to these English cases with the view for learned counsel for the plaintiff to address the court on the legal issues that these cases may pose to the plaintiff's ex parte applications. The defendants' complaint in this regard is that by so doing, the court is perceived as 'assisting' the plaintiff in its ex parte applications.

F

[70] In addition, learned counsel for the defendants also contended that this court was actively involved in 'correcting and/or repairing' the plaintiff's ex parte applications at the ex parte e-review hearing and the ex parte Zoom hearing which the defendants claimed had given rise to a real danger of bias, G again suggesting that by so doing, the court is perceived as 'assisting' the plaintiff in its ex parte applications.

[71] In order to appreciate the complaints by the defendants, it is necessary H to reproduce the relevant excerpts of the notes of proceedings for the ex parte e-review hearing on 6 November 2020. Prior to the said hearing, I had read the written submission and the cause papers filed by the plaintiff in support of the ex parte applications and had formed a preliminary view in respect of the same. I had also identified some legal issues which I had needed clarifications from I learned counsel for the plaintiff. Thus, at the ex parte e-review hearing, I asked the learned counsel for the plaintiff to address me on these issues. The exchange between the court and learned counsel for the plaintiff based on the court's records is as follow:

Peguam Plaintif 1:

My Lord. Would My Lord wish me to clarify any questions in respect of the court papers or submissions filed.

Mahkamah:

There are a few issues that I need you to further address the court:

(1) Whilst the affidavit disclose a prima facie case of conspiracy and breach of fiduciary duties, I am not convince that there is a extremely strong prima facie case to justify an Anton Pillar Order;

(2) Your submission has not address the issue of proportionality i.e the prejudice or damage to the defendants arising from the injunction vis-a-vis the objective of the order. The prayers for Anton Pillar are too wide;

(3) Given the pandemics, are not the risks too high? What if there are vulnerable persons at the premises? Who is to ensure the safety of these persons?

(4) As regards the Mareva injunction, there is no evidence of any assets overseas to warrant extending the order to a worldwide cover;

(5) The amount that the plaintiff is seeking to recover appear to cover sums which the plaintiff was never entitled to receive in the first place from Petronas Carigali since the invoices included fraudulent invoices?

(6) Do you agree that the plaintiff was involved in a fraud against Petronas Carigali based on the facts? Would the plaintiff not be imputed with, can the plaintiff be said to have not come to court with clean hands to warrant the fraudulent intent and knowledge of the first Defendant?

(7) If the answer to issue 6 is affirmative, can the plaintiff come to court to seek equitable remedies?

(8) I also need Plaintiff to address if there is a more limited prayers in the form of delivery up orders instead of Anton Pillar. Just because there is evidence of conspiracy and fraud does not necessarily mean propensity to destroy documents?

[72] The aforesaid exchanges led to learned counsel for the plaintiff seeking leave of the court to file further submissions and supplemental affidavits to address the issues raised. I then suggested that the hearing be by Zoom so that learned counsel for the plaintiff could submit orally on these issues. I ended by directing the learned counsel for the plaintiff to look at a few English cases that dealt with the issues raised. The relevant excerpt from the court's records is reproduced below:

Mahkamah:

Look at *Lock International plc v Beswick and Booker McConnell plc v Plascow* [1985] RPC 425 referred to in *Indicii Salus Ltd (in Receivership) v Chandrasekaran and others* [2007] EWHC 406 (Ch) on Anton Pillar.

A Look at *Stones & Rolls Ltd v. Moore Stephen* [2009] UK HL 39 on the imputation of knowledge or fraud by the company. Pls email further submissions to me by noon Sunday if possible.

B **[73]** None of the learned counsel for the defendants could explain to this court how the exchanges reproduced above could result in the court being perceived as 'assisting' the plaintiff in its ex parte applications. In fact, learned counsel for the eighth defendant conceded that she had not even read the cases that were referred to the learned counsel for the plaintiff at the ex parte e-review hearing.

C

[74] As far as I could remember in my experience as a litigator prior to my appointment to the bench, it is a common practice for a judge to raise any issues that may be troubling him to the counsel appearing before him when
D considering an application. This is so whether the application is in the nature of an ex parte proceeding or otherwise. This practice has never been a source of complaint let alone a reason to recuse the judge. By raising issues seeking clarifications from counsel, the judge is merely discharging his judicial function to satisfy himself that all legal issues which, in his opinion, are relevant to the
E application before him are being addressed to enable him to determine the application.

[75] A passage on this practice cited in *Ang Sue Khoon vMajlis Bandaraya Pulau Pinang & Anor* [2016] MLJU 1342 is instructive. At para 84 of the
F judgment, this was what is stated:

> 84.8 ... In modern legal proceedings, a judge or adjudicator does not sit silently through a hearing, keeping his views and thoughts to himself; and expressing them, for the first time and with finality, only in his judgment. The opposite is, indeed,
G encouraged. Most counsels appreciate being alerted to the matters, of fact or law, which may be troubling a judge during a proceeding; because they can then do their best to address the judge's concerns. If a judge sits silently throughout a hearing, counsels will only discover for the first time what has been troubling him, when the judge's views emerge as final conclusions in his judgment; by which time it will be too late for a counsel to address the same.

H

> 84.9 ... The apex court of Australia, in *Johnson v Johnson* (2000) 74 ALJR 1380 @ 1382, para [13]; describes the modern practice to which I have just referred, and highlights the need to take a practical view of matters in the context of ordinary judicial practice:
>
> I
>
> > Whilst the fictional observer is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges intervene in the conduct of cases to an

> extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them.

[76] In reaching that decision, reference was also made to the Australian Federal Court's decision in *Richmond River Broadcasters Pty Ltd and Another vAustralian Broadcasting Tribunal and Others* (1992) 106 ALR 671. In this case, Wilcox J expressed the advantage of judges expressing their tentative views during the proceedings to provide guidance to parties, as follows:

> ... It is an everyday event for judges to indicate to counsel, during the course of a hearing, their impressions of a case, including their impressions of witnesses and of the facts. They do so to assist counsel. It is always an advantage for counsel to know the way in which the judge's mind is working; submissions may be targeted to the aspect of the case which is troubling the judge. Where a judge takes this course nobody would suggest that the judge ought then to be disqualified from concluding the case. The reason is that the judge is merely expressing a tentative view and inviting a response which he or she may take into account in determining whether to adhere to, or abandon, that view in the final decision. The readiness to listen and be persuaded is the critical matter.

[77] In the present case, what the court did at the ex parte e-review hearing was to inform learned counsel for the plaintiff as to what was troubling the court in respect of the ex parte applications and to ask the learned counsel to address the same. With respect, I cannot see how it can reasonably be argued that there is a real danger of bias arising from my action in seeking the clarifications from counsel. To quote Wilcox J, 'where a judge takes this course, nobody would suggest that the judge ought then to be disqualified from concluding the case'.

[78] Further, in *Residence Hotel* one of the contentions was that the judge had 'advised' the defendant to reconsider its position as to whether to proceed with the counterclaim. In rejecting such contention, it was held that the judge had merely inquired whether the defendant would reconsider its position. Such observation did not necessarily mean that the court had made a finding on the merits of the defendant's counterclaim.

[79] In fact, from the transcripts it must have been obvious to learned counsel for the defendants that the court was concerned over the Covid-19 pandemic and the adequacy of the safeguards to be afforded to the defendants. It was this that had led learned counsel for the plaintiff to subsequently

abandon their application for an Anton Pillar orders and merely sought for a forthwith delivery order. Even for the forthwith delivery order, the court had required the plaintiff to place adequate safeguards in place for the benefit of the defendants. This exercise was to ensure that there is a balance between the interest of the plaintiff and the defendants.

[80] Further, learned counsel for the defendants argued that the court was biased in granting the ex parte orders when the court had expressed in the ex parte e-review hearing that it was not convinced that 'there is a strong prima facie case against the defendants'.

[81] Learned counsel for the defendants submitted that the court ought to have converted the ex parte hearing into an inter parte hearing after having expressed the tentative view that the plaintiff does not have 'a strong prima facie case' against the defendants. The argument as I understand it is that by failing to do so and continuing to hear the plaintiff on an ex parte basis, somehow there is created a danger of bias that I would not be fair and independent towards the defendants.

[82] The submission by learned counsel for the defendants referred to the following exchange between the court and learned counsel for the plaintiff:

> Peguam Plaintiff: Yes My Lord, we will consider these three English decisions and email and e-file the supplementary submissions to address My Lord's queries by noon Sunday. Further, we are taking instructions to file a supplementary affidavit regarding defendant employees' risk of destruction of evidence.

[83] Based on the aforesaid, learned counsel for the defendants submitted thus:

> Despite that, Yang Arif Tuan Ong Chee Kwan did not convert the said ex parte applications into inter parte and/or directed the plaintiff to file an application for inter parte. These were not done by Yang Arif Tuan Ong Chee Kwan and it clearly show that there is real danger of bias should Yang Arif Tuan Ong Chee Kwan not recuse from further hearing the case.

[84] With respect, I find the submission simply untenable. Surely learned counsel for the defendants would appreciate that given the nature of the reliefs sought and the allegations of fraud against the defendants in this case, the effectiveness of the plaintiff's ex parte applications would require that the same be heard ex parte instead of inter parte. In any event, merely because the defendants may not be happy with the court's decision to proceed to hear the ex parte applications on an ex parte basis after expressing a tentative view of the plaintiff's application does not warrant a recusal application.

[85] Learned counsel for the defendants absolutely failed to provide any cogent argument how the decision to proceed to hear the plaintiff ex parte could give rise to a 'real danger of bias' on my part.

[86] In *Residence Hotel* the late VT Singham J clearly expressed that a judge's decision which did not favour a litigant cannot be used as an instrument to recuse the judge or to remove the case to another court. His Lordship further expressed, at para 30 of the judgment that:

> [30] If the nature of the complaint as raised by the defendant is permitted or freely accepted as a ground to recuse a judge, as in the case before this court, no court will ever be able to safely make any findings, observation or tangible criticism against a party's case in the matter before the court in his or her grounds of judgment for fear that the findings or observation may be used as a ground to recuse the judge from further hearing the related matters in the case on the 'filmiest pretext of bias' (sic) and that no doubt will interfere with the judicial independence conferred on the judge. In the present case, with respect, the findings and observations of this court in the summary judgment were justified on the factual matrix of the case and was supported by the contemporaneous and admissible documents produced by affidavit evidence. Therefore, with respect, it is most unfair, improper, undignified of the defendant to apply to recuse the Bench for making judicial findings and when the decision was given against him by raising grounds which on the face of it is flimsy and frivolous and ought not to be judicially tolerated and be should rejected *in limine.* It is important to maintain and for this court to dispense justice fearlessly and impartially and free from any intimidation or pressure.

[87] With respect, there is plainly no substantive basis or any cogent evidence to support the defendants' claim of a real danger of bias to merit my recusal from hearing this case. The defendants are not entitled to the recusal based on the 'flimsiest pretext of bias'.

CONCLUSION

[88] Whilst the litigant is entitled to apply to recuse a judge, such application must only be made after considering the harm that it may inflict on the integrity of the judiciary and to the administration of justice if the grounds relied upon are frivolous and wholly unwarranted.

[89] More so where it involves matters of judicial records and the exercise of judicial discretion in the mode of hearing the applications. There is a strong presumption that judges honour the oath and do dispense justice without bias. The leading text of *Sarkar on Evidence* (18th Ed) contains an instructive statement which is worthwhile reproducing:

> Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. Judgments cannot be treated as mere counters in the game of litigation. We are bound to accept the statement of the judges recorded

in their judgments, as to what transpired in Court. The statement of the judges cannot be allowed to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them that has to be last word on the subject.

[90] To my mind, the cavalier manner in which the recusal applications were filed and the grounds relied upon were so frivolous and flimsy and if I may say, even disrespectful, that the entire recusal applications border on contempt of court. In these circumstances, encls 246, 250 and 252 are dismissed with costs fixed at RM 15,000 for each encls. The costs are to be borne by the counsel personally.

Enclosures 246, 250 and 252 dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh